U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0174 BLA

RONNIE HOLLAND	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FLATWOODS COAL COMPANY	)	
	)	DATE ISSUED: 06/28/2021
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer/Carrier.

Kathleen H. Kim (Elena Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge William S. Colwell's Decision and Order Awarding Benefits (2017-BLA-06024) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on September 2, 2015.[1] *See* Director's Exhibit 7.

Because Claimant's earnings indicated he worked for Employer for a total of 159 work days, the administrative law judge found Employer is the responsible operator who last employed Claimant for at least one year. *See* Decision and Order at 17. He credited Claimant with a total of 15.391 years of underground coal mine employment and found he is totally disabled, thus establishing a change in an applicable condition of entitlement and invoking the Section 411(c)(4) presumption.[2] *Id.* at 35-36. He further found Employer did not rebut the presumption and therefore awarded benefits. *Id.* at 38-39.

Employer appeals, first raising a challenge to the administrative law judge's authority to decide this case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It also contends the administrative law judge erred in finding it is the responsible operator, Claimant has a total

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[1] Claimant filed his first claim for benefits on October 29, 1991, which the claims examiner denied on April 8 and July 22, 1992, because Claimant did not establish any element of entitlement. *See* Director's Exhibit 1. Thereafter, Claimant filed four more claims, each of which he withdrew. A withdrawn claim is considered "not to have been filed." *See* 20 C.F.R. §725.306(b). Claimant filed the present claim on September 2, 2015.

[2] Section 411(c)(4) of the Act provides a miner with a rebuttable presumption that he is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

respiratory disability and is entitled to the Section 411(c)(4) presumption, and it did not rebut the presumption. Claimant filed a response brief in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a brief urging rejection of Employer's constitutional challenges to the administrative law judge's appointment and asserting Employer was properly designated as the responsible operator. Employer filed a reply brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer contends the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, and *Lucia v. SEC*, 585 U.S. __, 138 S. Ct. 2044 (2018), and the Secretary of Labor's (Secretary) subsequent ratification of his appointment did not cure the constitutional defect. Employer further challenges the constitutionality of the provisions governing the removal of administrative law judges.

The Director responds that Employer forfeited its Appointments Clause challenges by failing to raise them before the administrative law judge and that, in any event, the administrative law judge was validly appointed. Employer replies that it would have been futile to raise the issue before the administrative law judge because administrative law judges do not have authority to decide constitutional questions of this kind. Employer maintains that under *Lucia*, it is sufficient if an Appointments Clause challenge is first raised before the Board. We disagree.

Appointments Clause issues are "non-jurisdictional" and thus are subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring a "timely challenge to the constitutional validity of the appointment of the officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted). The Court decided *Lucia*

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant last performed coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Employer's Exhibit 8 at 7; Hearing Transcript at 25.

on June 21, 2018, approximately six months after the Secretary ratified the administrative law judge's appointment and less than two months after the administrative law judge held the formal hearing in this case. The administrative law judge issued his January 20, 2020 Decision and Order more than a full year after the Court decided *Lucia*, yet Employer failed to raise its argument at any time while the case was pending before him. For the reasons stated in *Joseph Forrester Trucking v. Director, OWCP*, 987 F.3d 581 (6th Cir. 2021), we conclude Employer forfeited its Appointments Clause challenge by not timely raising it before the administrative law judge. *See also Powell v. Service Employees Int'l*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminal Inc.*, 53 BRBS 9, 11 (2019); *see also* 20 C.F.R. §802.301(a) (Board cannot engage in "unrestricted review of a case" but must limit its review to "the findings of fact and conclusions of law on which the decision or order appealed from was based").[5] Furthermore, Employer has not identified any basis for excusing its forfeiture of its Appointments Clause challenge. *Joseph Forrester Trucking*, 987 F.3d at 591 ("[administrative law judges] can entertain as-applied [Appointments Clause] challenges and provide the requested relief"); *see Glidden Co. v Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging).

We further agree with the Director's position that Employer's challenge to the removal provisions – which it also did not raise before the administrative law judge – is adjunct to its forfeited Appointments Clause challenge and thus also is forfeited. *See, e.g.*, *Fleming v. Dept. of Agriculture*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning the 5 U.S.C. §7521 removal provisions are subject to issue exhaustion, and because petitioners "did not raise the dual cause removal provision before the agency," the court was "powerless to excuse the forfeiture").

Responsible Operator

Employer challenges its designation as the responsible operator. It argues the administrative law judge erred in not accepting a stipulation that Maynard Branch Mining, another of Claimant's prior employers, made agreeing it was the responsible operator in Claimant's first claim for benefits. Employer also contends the administrative law judge's finding that it is the responsible operator who last employed Claimant for at least one year is not supported by the evidence.

[5] Because we hold Employer forfeited its Appointments Clause challenge, we need not address Employer's challenge to the validity of the Secretary's ratification of the administrative law judge's appointment.

The regulation at 20 C.F.R. §725.309(c)(5) provides that "any stipulation made by any party in connection with the prior claim will be binding on the party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(c)(5). In order for a stipulation to be binding, it must be fairly entered into by the parties. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996). In this case, we agree with the Director's argument and the administrative law judge's ruling that it is unclear if Maynard Branch intended to enter into a stipulation regarding its designation as the responsible operator. The only evidence in that regard is a checkmark on a DOL form that Maynard Branch's bookkeeper signed in Claimant's first claim, which was later contradicted by Maynard Branch's denial of liability in that claim. *See* Director's Exhibit 1 at 707-715. Under the circumstances, the administrative law judge did not err in adjudicating the issue of whether Employer was properly designated as the responsible operator in this claim.[6]

Employer next argues it should be dismissed as the responsible operator because it employed Claimant for less than a calendar year. Specifically, Employer contends the administrative law judge erred by ignoring the beginning and ending dates of Claimant's employment with Employer and applying the method set forth in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019) to calculate the length of such employment. Employer's arguments are without merit.

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for a cumulative period of not less than one year.[7] 20 C.F.R. §§725.494(c), 725.495(a)(1). The Director bears the burden of proving the operator is a potentially liable operator. 20 C.F.R.

[6] Similarly, collateral estoppel does not apply because the issue of the properly designated responsible operator was not fully litigated during the adjudication of Claimant's first claim, nor was it necessary to the outcome as the claims examiner denied benefits. *See Ark. Coals, Inc. v. Lawson*, 738 F.3d 309, 313 (6th Cir. 2014) (collateral estoppel does not bar reconsideration of the responsible operator issue in a subsequent claim because the identification of a responsible operator is not a necessary finding where benefits are denied); *see generally Nat'l Satellite Sports, Inc. v. Eliadis*, 253 F.3d 900, 908 (6th Cir. 2001).

[7] In addition, the evidence must establish the miner's disability or death arose out of coal mine employment with that operator; the entity was an operator after June 30, 1973; the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

§725.495(b). Once designated, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The Sixth Circuit in *Shepherd* made it clear that even if the beginning and ending dates of a miner's employment are ascertainable and the miner was employed for less than a calendar year, an administrative law judge may use the miner's yearly income to calculate the number of days the miner worked in coal mine employment during that year. *Shepherd*, 915 F.3d at 402. As the court stated, "[i]f the miner worked for at least 125 days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year." *Id.* The administrative law judge relied on Claimant's 1991 employment history form,[8] in conjunction with his Social Security Administration Earnings Record and credible testimony as to his hourly pay rate and the daily number of hours he regularly worked to credit Claimant with one year of coal mine employment with Employer. We affirm the administrative law judge's finding as it is rational, supported by substantial evidence, and consistent with law.[9] 20 C.F.R. §§725.101(32)(i) (if the evidence establishes "the miner worked in or around coal mines at least 125 working days during a calendar year . . . then the miner has worked one year in coal mine employment for all purposes under the Act); 725.101(32)(ii) ("[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony"); *Shepherd*, 915 F.3d at 401; *Lafferty v. Cannelton Indus.*, 12 BLR 1-190 (1989). As Employer raises no other arguments on the issue, we affirm the administrative law judge's

[8] The 1991 form reflects Claimant worked for Employer as a "drill operator/shot foreman" from July 1990 to February 1991. Director's Exhibit 1.

[9] In making his determination as to the number of days Claimant worked in coal mine employment for Employer, the administrative law judge permissibly relied on Claimant's earnings with Employer in 1990 ($13,460.57) and 1991 ($3,724.50), as reported in his Social Security Administration Earnings Record and Claimant's "reliable and credible" statements that he was paid $12 per hour for nine hour work days during that period of work. Dividing those earnings by a calculated daily wage of $108 ($12 per hour times 9 hours), he rationally concluded Claimant worked for Employer from July 1990 through February 1991 for a total of 159 working days, i.e., 124.6 days in 1990 and 34.4 days in 1991. We therefore affirm, as reasonable and supported by substantial evidence, his computation of the length of Claimant's coal mine employment with Employer. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

finding that Employer is the responsible operator. *See* 20 C.F.R. §§725.494(c), 725.495(a)(1); *Bungo v. Bethlehem Mines Corp.*, 8 BLR 1-348, 1-350 (1986).

The Merits of Entitlement

To be entitled to benefits under the Act, a claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits.[10] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Invocation of the Section 411(c)(4) Presumption – Total Disability

Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and is totally disabled.[11] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood

[10] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement … has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The claims examiner denied Claimant's prior claim because he did not establish any element of entitlement. Consequently, to obtain review of the merits of his current claim, Claimant had to establish a change in any element of entitlement. 20 C.F.R. §725.309(c)(3),(4).

[11] Employer also challenges the administrative law judge's finding that Claimant established more than fifteen years of underground coal mine employment, contending only that the administrative law judge erred in applying *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019) because that case was incorrectly decided. This case arises within the jurisdiction of the Sixth Circuit, *see* n.3, *supra*, and thus the administrative law judge applied binding precedent in calculating 15.391 years of coal mine employment.

gas studies,[12] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[13] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found the preponderance of the valid pulmonary function tests are qualifying and thus demonstrate total disability,[14] whereas none of the blood gas studies produced qualifying values and therefore do not establish total disability. 20 C.F.R. §718.204(b)(2)(i),(ii); Decision and Order at 33. He next credited the opinions of Drs. Everhart, Raj, Rosenberg, and Nader to find the medical opinion evidence demonstrates the existence of a totally disabling pulmonary impairment. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 34-35. Weighing together all of the newly submitted evidence, "like and unlike," he found the medical opinions diagnosing total disability most persuasive and thus concluded Claimant is totally disabled from a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). Decision and Order at 36. He therefore found Claimant established a change in an applicable condition of entitlement and invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act. *Id*.; *see* 20 C.F.R. §718.305.

Relying on the United States Court of Appeals for the Fifth Circuit's decision in *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), Employer argues this case should be held in abeyance pending resolution of claims that portions of the Affordable Care Act (ACA) are unconstitutional and its remaining provisions, including revival of the Section 411(c)(4) presumption, cannot be severed. Employer's argument is moot as the Supreme

[12] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[13] The administrative law judge accurately noted there is no evidence of cor pulmonale with right-sided heart failure. Decision and Order at 33.

[14] The record contains five pulmonary function studies dated September 29, 2015, October 18, 2016, April 19, 2017, and August 10, 2017 and August 18, 2017. *See* Director's Exhibit 23; Claimant's Exhibits 1 and 3; Employer's Exhibits 5 and 6.

Court dismissed the claims in *Texas*. *California v. Texas*, __ U.S. ___, No. 19-840, 2021 WL 2459255 at *10 (Jun. 17, 2021).

Employer next contends the administrative law judge's finding that Claimant has a totally disabling respiratory impairment, and thus invoked the Section 411(c)(4) presumption, rests on his failure to analyze the evidence under the proper standard and to consider all relevant evidence. It maintains the administrative law judge's total disability finding ignored Claimant's treatment records, which disclose multiple conditions affecting his health but provide no assessment of any respiratory impairment or disease. Employer also contends the administrative law judge failed to adequately address the validity of the pulmonary function studies in terms of the uncontradicted expert opinions stating they are not reliable indicators of Claimant's pulmonary capacity. It also asserts the administrative law judge's "unexplained conclusion" that Claimant is totally disabled by a respiratory impairment does not satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), because he did not weigh all of the evidence, including evidence that does not support a finding of respiratory disability or disease, i.e., the medical opinions of Drs. Tuteur and Rosenberg and the arterial blood gas tests. Employer's contentions are meritless.

The administrative law judge accurately noted Claimant's treatment records contain references to his numerous health conditions including colon cancer, prostate cancer, diabetes, gout, degenerative disc disease, and a lesion on his kidney, as well as pneumoconiosis. *See* Director's Exhibit 26. He reasonably found the records do not provide any assessment of whether Claimant is totally disabled from a respiratory or pulmonary impairment. Decision and Order at 35 n.16. Thus, the administrative law judge was not required to give them weight in assessing total disability. In addition, contrary to Employer's argument, the administrative law judge considered Dr. Vuskovich's opinion that the September 29, 2015 and October 18, 2016 pulmonary function studies are invalid. *See* Employer's Exhibit 7; Director's Exhibit 24. While the administrative law judge found all the studies in substantial compliance with the quality standards, he further found that even if he were to exclude the allegedly invalid pulmonary function studies from consideration, the preponderance of the remaining pulmonary function study evidence produced qualifying values and therefore weighed in favor of establishing total disability. *See* Decision and Order at 33. In this regard, the record establishes the three remaining pulmonary function studies, each performed in 2017, produced qualifying results, both pre- and post-bronchodilator if a bronchodilator was used. Employer's Exhibits 5, 6; Claimant's Exhibit 1. Consequently, we affirm the administrative law judge's finding that the pulmonary function studies demonstrate total disability as it is supported by substantial evidence.

We also affirm the administrative law judge's weighing of the medical opinions to find they establish total disability. Contrary to Employer's contention, while Dr. Tuteur and Dr. Rosenberg disagreed with the other doctors as to the cause of Claimant's total disability, both agreed Claimant is totally disabled. *See* 20 C.F.R. §718.204(b) (relating to the existence of total respiratory or pulmonary disability); 20 C.F.R. §718.204(c) (relating to the cause of that total disability). Dr. Tuteur stated Claimant is "totally and permanently disabled from returning to work in the coal mine industry" due in part to smoking-related chronic obstructive pulmonary disease (COPD). Employer's Exhibit 5. Dr. Rosenberg also agreed Claimant is totally disabled "because of [a] pulmonary impairment," which he attributed to various causes. *See* Employer's Exhibits 6 at 7, 16 at 9, 17 at 9. The administrative law judge reviewed all the medical opinions in the record and accurately noted all the physicians agree Claimant is unable to perform his last coal mine employment from a pulmonary standpoint. *See* Decision and Order at 35. He acted within his discretion in finding all the medical opinions on total disability well-reasoned and well-documented. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013). As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence establishes Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(iv); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 357 (6th Cir. 2007).

We also reject Employer's argument that the administrative law judge's overall analysis of the evidence on total disability does not comply with the requirements of the APA. In weighing all of the newly submitted evidence together, like and unlike, the administrative law judge accurately summarized all the evidence pertaining to total disability, including the blood gas study evidence and opinions of Drs. Tuteur and Rosenberg, and rationally accorded greatest weight to the medical opinions because they are based both on Claimant's objective testing results and physical examinations.[15] *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 23-35. The administrative law judge adequately explained his reasons for his conclusion that the newly submitted evidence, when weighed together, establishes the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2). *See A&E Coal Co. v. Adams*, 694 F.3d 798 (6th Cir. 2012). We therefore affirm his determinations that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1), 725.309.

[15] Furthermore, non-qualifying blood gas studies do not undermine qualifying pulmonary function tests because they measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant successfully invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[16] nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.[17]

Employer contends the administrative law judge applied an improper standard for rebuttal and mischaracterized the evidence in determining Drs. Tuteur and Rosenberg did not adequately explain how they excluded coal mine dust exposure as a cause or contributory factor in Claimant's pulmonary impairment. We disagree.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The Sixth Circuit requires Employer establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

[16] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[17] Because the administrative law judge found Employer did not rebut the existence of legal pneumoconiosis, he did not address whether Employer rebutted the existence of clinical pneumoconiosis. *See* Decision and Order at 38 n.20.

Employer relies on Drs. Tuteur's and Rosenberg's opinions.[18] Citing medical literature and studies as support, Dr. Tuteur opined Claimant's COPD and impairment are not related to coal mine dust inhalation, but instead are "due to factors including tobacco smoke inhalation, childhood fossil fuel combustion fume exposure, and chronic [gastroesophageal reflux disease]." Employer's Exhibits 5, 15. Dr. Rosenberg stated Claimant has a pulmonary impairment due to his reduced lung volumes on pulmonary function testing, but stated it is due to Claimant's other diseases, including diabetes, hypertension, obesity, and generalized weakness. Employer's Exhibits 6 and 16. He additionally stated Claimant's qualifying pulmonary function study results are not related to coal mine dust exposure or to pneumoconiosis. Employer's Exhibits 6, 16, 17.

Having set out the appropriate standard for rebuttal and having reviewed their respective opinions,[19] Decision and Order at 36-38, the administrative law judge found neither Dr. Tuteur nor Dr. Rosenberg provided an adequate explanation for why they completely excluded Claimant's coal dust exposure as a cause of his disease or impairment and instead pointed to other causes. In this regard, Dr. Tuteur relied on medical studies indicating that "never smoking miners" have less risk of developing COPD than "never mining smokers." *See* Employer's Exhibit 5 at 3-5. The administrative law judge found Dr. Tuteur did not adequately explain how these studies are related to Claimant's specific health condition, other than Dr. Tuteur's acknowledgment that Claimant was both a miner and a smoker. *See* Decision and Order at 38. He also found, even accepting Dr. Tuteur's premise that coal dust exposure poses less risk for developing COPD than smoking, the physician did not explain why Claimant could not have been one of the small percentage of smoking miners who suffer from an impairment caused by coal mine dust. *Id.*

The administrative law judge also permissibly discredited Dr. Rosenberg's opinion because, in relying on Claimant's improvement in pulmonary function after bronchodilation, the physician did not sufficiently explain how he excluded Claimant's

[18] Dr. Nader stated Claimant's occupational history of exposure to coal dust was a significant and contributing factor to his pneumoconiosis and chronic bronchitis/COPD. *See* Claimant's Exhibit 2 at 3. Dr. Raj opined Claimant has both clinical pneumoconiosis and legal pneumoconiosis in the form of chronic bronchitis/COPD significantly related to coal dust exposure. *See* Claimant's Exhibit 1 at 3-4.

[19] Thus, contrary to Employer's contention, the administrative law judge applied the proper rebuttal standard by requiring it to establish either that Claimant does not have pneumoconiosis or that "no part" of his respiratory or pulmonary total disability was caused by pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80 (6th Cir. 2011); Decision and Order at 36-39.

coal dust exposure as even a contributor to his impairment.[20] Decision and Order at 38. He also permissibly found Dr. Rosenberg's opinion inconsistent with the DOL's recognition that a miner can have legal pneumoconiosis even in the absence of x-ray evidence of clinical pneumoconiosis.[21] *See* 20 C.F.R. §§718.201, 718.202(a)(4); *Adams*, 694 F.3d at 802-03; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); Decision and Order at 37-38.

The administrative law judge relied on proper considerations in determining Drs. Tuteur's and Rosenberg's opinions are not adequately reasoned or persuasive to disprove Claimant has legal pneumoconiosis. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511 522 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Because the administrative law judge acted within his discretion in rejecting their opinions and his findings are supported by substantial evidence, *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712 (6th Cir. 2002), we affirm his determination that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Rowe*, 710 F.2d at 255; Decision and Order at 21.

Disability Causation

The administrative law judge next considered whether Employer rebutted the presumption by establishing that "no part" of Claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 36, 38-39. He rationally discredited Drs. Tuteur's and Rosenberg's opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 39. Further, the administrative law judge found the same reasons for which he discredited their opinions

[20] Moreover, two of Claimant's most recent pulmonary function studies produced qualifying results even after the administration of bronchodilators. *See* Employer's Exhibit 5; Employer's Exhibit 6.

[21] Dr. Rosenberg opined Claimant's restrictive impairment does not constitute legal pneumoconiosis in part because, "If [Claimant] had restriction related to past coal mine dust exposure, advanced parenchymal changes would have been observed [radiographically]." Employer's Exhibit 6 at 7. The administrative law judge rationally deemed his statement an "apparent disinclination to diagnose legal pneumoconiosis in the absence of clinical pneumoconiosis." Decision and Order at 38.

that Claimant does not have legal pneumoconiosis also undercut their opinions that Claimant's disabling respiratory impairment was not caused by the disease. Decision and Order at 39. Because we have affirmed the administrative law judge's findings on legal pneumoconiosis, we affirm his determination that Employer failed to prove no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Because Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis and Employer did not rebut the presumption, Claimant has established his entitlement to benefits. 30 U.S.C. §921(c)(4) (2018).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge